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89-1546
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ADMIRAL EQUIPMENT COMPANY,
Petitioner,
vs.
CURLEY JOSEPH CHARLES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

This case arises from plaintiff/respondent's injuries sustained while plaintiff worked adjacent to a mechanical conveyor line. Defendant/Petitioner Admiral Equipment Corporation originally designed and installed the conveyer line and related equipment, but plaintiff's employer substantially redesigned the conveyor several years later, before plaintiff's injuries. The jury found the substantially changed conveyor line was a "different product" than that originally installed by Admiral and therefore found Admiral not liable under plaintiff's strict products liability theory. However, the jury found Admiral liable to plaintiff pursuant to plaintiff's negligence theory. The questions presented are:

1. Should judgment against petitioner Admiral be reversed and judgment entered for Admiral based on the finding by the jury that the equipment which injured plaintiff in 1980 was neither designed nor manufactured by Admiral?

2. Should the judgment against Admiral be reversed and judgment entered in Admiral's favor based on the jury's finding that plaintiff's injury did not result from a use of the product which was reasonably foreseeable by Admiral?

3. Did the District Court improperly reconcile the facially inconsistent jury verdicts against Admiral and thereby deprive Admiral of its Seventh Amendment right to jury trial?

PARENT COMPANIES/SUBSIDIARIES

At the time of the underlying incident, Admiral was a subsidiary of The Upjohn Company.[1] Other subsidiaries of Upjohn are:

Asgrow Argentina, S.A.I.C.
Asgrow Canada, Ltd.
Asgrow do Brasil Sementes Ltda.
Asgrow Florida Company
Asgrow France S.A.
Asgrow G.m.b.H.
Asgrow International Corp.
Asgrow Mexicana, S.A. e C.V.
Asgrow Middle East Seed Company Ltd.
Asgrow Seed Company
Asgrow Seed New Zealand Limited
Asgrow South Africa (Pty) Ltd.
Bruinsma-Iberica, S.p.a.*
Bruinsma-Selectiebedrijn, B.V.*
Ceres, S.A. de C.V.*
Cobb Breeding Company Limited
Cobb, Incorporated
Compania Farmaceutica Upjohn S.a. (Guatemala)
Compania Upjohn S.A. (Columbia)
Farmcraft Seed Co.
HealthCare Services Upjohn Limited
Horticultura de Salama (Guatemala)
Japan Upjohn Limited (Japan)
Kalamazoo Center Holdings, Inc.
Kasei Upjohn Company (Japan)
Kenral Inc. (Canada)
Korea Upjohn Ltd. (Korea)
Laboratoires Upjohn S.A.R.L. (France)

---

[1] Admiral was since sold to Dow Chemical, however, Upjohn agreed to, and remains, the party responsible for any judgment awarded against Admiral.

Laboratorios Upjohn C.A. (Venezuela)
New York HealthCare Services, Inc.
O's Gold Seed Company (Michigan)
P. T. Upjohn Indonesia (Indonesia)
Somerset Pharmaceuticals Limited (England)*
TUCO Chemical Company Limited (England)
TUCO (Proprietary) Limited (South Africa)*
TUCO Products Company, Div. of Upjohn Inter-American Corporation
UFSC, Inc. (Virgin Islands)
Union Interpharmaceutique Atlantique, S.A.R.L.
United Hagie Hybrids, Inc.
Upjohn AB (Sweden)
Upjohn Compania Limitada (Chile)
The Upjohn Company of Canada, Div. of Upjohn Inter-American Corporation
Upjohn Company Limited (Thailand)
Upjohn Company Pte. Ltd. (Singapore)*
Upjohn Company S.A. (Panama)
Upjohn Coordination Center N.V. (Belgium)
Upjohn Farmoquimica Lda. (Portugal)
Upjohn Farmoquimica, S.A. (Spain)
Upjohn GmbH (Germany)
Upjohn HealthCare Services, Inc.
Upjohn Holding Company (Michigan)
The Upjohn Holding Company C
The Upjohn Holding Company M
Upjohn Inc. (Philippines)
Upjohn Industrial and Commercial S.A. (Greece - Referred to as Upjohn ABEE - In process of liquidation)
Upjohn Inter-American Corporation (Michigan)
Upjohn International Holding Company (previously, Upjohn Polymer International, Inc.
Upjohn International Inc. (Michigan)
Upjohn L.L.C. (Greece)*
Upjohn Laboratories Ltd. (Taiwan)

Upjohn Limited (England)
Upjohn (Proprietary) Limited (South Africa)
The Upjohn Manufacturing Company
Upjohn Overseas Company (Michigan - To be dissolved)
Upjohn Pharmaceuticals Limited (Delaware)
Upjohn Polymer (Europa) AG (Switzerland)
Upjohn Polymer Pty. Limited (Australia)
Upjohn Products Co. Limited (Kenya)*
Upjohn Pty. Limited (Australia)
Upjohn S.A. (Belgium)
Upjohn S.A. de C.V. (Mexico)
Upjohn S.p.A. (Italy)
Upjohn Trading Corporation (Michigan)
Upjohn Verwaltungs GmbH (Germany)
Walter Gregory & Co. Limited (England)*

Upjohn joint ventures are:

Admiral Espanola, S.A.
Arizona Home Care
Chugai-Upjohn, Inc.
Cobb-Vantress,Inc.
Complejo Asgrow Semillas - S.A.
Franciscan Home Health Care
Home Care of Maryland
Home Care of Thousand Oaks
Home and Family Services of The Blue Grass (Lexington, Kentucky)
Home and Family Services of Kentucky (Louisville, Greenville)
Lansing Home Care
Physicians Home Care
Physicians Home Care of Utah
Prime Care
Saudi Urethane Chemicals Company
University HomeHealth Care

* Inactive

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

ADMIRAL EQUIPMENT COMPANY,
Petitioner,
vs.
CURLEY JOSEPH CHARLES,
Respondent.

PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioner Admiral prays that the Supreme Court grant a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals, which was filed November 22, 1989, affirming the finding of negligence against Admiral. Admiral filed a petition to the Ninth Circuit for rehearing on December 5, 1989. The Ninth Circuit, on January 3, 1990, denied Admiral's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The jurisdiction of the district court was invoked under 28 U.S.C. Section 1332 because of diversity of citizenship, the plaintiff being a citizen of California and defendant/petitioner Admiral, being a citizen of Delaware, with its principal place of business in Ohio.

STATEMENT OF THE CASE

Plaintiff filed this action in the Superior Court for the County of Los Angeles. The case was timely removed to the Federal District Court for the Central District of California based on diversity jurisdiction, 28 U.S.C. section 1332.

A. The Accident

As set forth in detail in Admiral's Opening Brief to the Ninth Circuit, plaintiff's injuries arose from an accident which occurred while he was working adjacent to an injection mold conveyer line. Plaintiff's former job consisted of scraping off excess foam from a leaking foam pour head. While doing that, he caught his hand on a clamp on top of a passing pallet. He was then dragged behind that pallet and his hips were broken when he was caught between the following pallet and the pour room wall.

B. The Parties' Contentions

Plaintiff contended that an emergency cable-operated cut-off switch should have been installed near the conveyer line. Plaintiff claimed such a switch would have allowed plaintiff to stop the line after his hand was caught in the pallet, preventing injury.

Admiral contended that the substantial changes made by plaintiff's employer in 1978 to the conveyer line, after the line was installed by Admiral in 1972, were the causes of plaintiff's injury and precluded Admiral from being liable. Specifically, plaintiff's employer removed

the safety electrical cut-off feature employed in Admiral's system, which the uncontroverted evidence established would have prevented plaintiff's injury.

Additionally, Admiral presented evidence that the accident would not have occurred but for plaintiff's employer's substantial speeding up of the conveyer line in connection with the 1978 changes, as well as removing most of the space between the large pallets. Significantly, Admiral's design contemplated that no employee be present in the pour room during operations, and also the defective pour head which required plaintiff's presence was replaced during the 1978 renovation and was no longer Admiral's product.

The liability phase of the case was originally tried to a mistrial in June 1983 after the jury was deadlocked. It was retried in September 1986. At the retrial, plaintiff dismissed his breach of warranty and failure to warn claims and proceeded to trial solely on his strict liability and negligence claims based on Admiral's failure to install a cable-operated safety switch in the pour room. [R.T. (9/9) 9:21-10:8]

C. The Juries' Inconsistent Verdicts

The jury found that Admiral was not liable under plaintiff's products liability theory, specifically concluding that the 1972 Admiral conveyer line and the 1978 revised line were "different products." Additionally the jury found that the 1978 renovations to the conveyer line made the 1978 version of the product an "unforeseeable use." However, seemingly contrary to the products liability finding of the jury, the jury held that Admiral was liable under plaintiff's negligence theory for failing to install a safety cut-off switch in the 1972 conveyer line — despite the fact that the jury found the 1978 line

which injured plaintiff was a "different product" from the 1972 Admiral line.

After more than two days of deliberation the jury returned its special verdict which, among other findings, provided:

> 1. The Jury responded "No" to special verdict question No. 4 — "Did Plaintiff's injury result from a use of the product that was reasonably foreseeable by the Defendant Admiral Equipment Company."
>
> 2. But, the jury also responded "Yes" to special verdict questions 5 and 6 that Admiral was negligent and its negligence caused plaintiff's injuries. [Excerpt of Record (EOR) p. 1-4]

Thus, the jury found Admiral not liable under plaintiff's strict product liability theory, but liable pursuant to plaintiff's negligent product design theory. Admiral moved for judgment on the verdict (Clerk's Record (CR) Entry No. 214) which was denied. (Supp. EOR, pp. 5-16; CR 215)

Because of a perceived inconsistency in the jury's findings, the District Court directed the jury to deliberate further [EOR, p. 7], after which the jury issued the following written statement:

> "THE JURY WISHES TO STATE THE FOLLOWING:
>
> "WE BELIEVE THE 1972 AND THE 1978 VERSION OF THE PRODUCT ARE TWO DIFFERENT PRODUCTS.

"IN ANSWERING QUESTION #4 OUR FOCUS WAS ON THE 1978 VERSION OF THE PRODUCT. THIS USE WAS NOT FORESEEABLE TO ADMIRAL.

"IN ANSWERING QUESTION #5 OUR FOCUS WAS ON THE 1972 AND 1978 VERSIONS OF THE PRODUCT. HERE THERE WAS FORESEEABLE USE IN BOTH THE '72 AND '78 VERSIONS.

"WE HAVE TWO "FORESEEABILITIES"

"UNDER LIABILITY — THE FORESEEABILITY OF THE USE OF THE PRODUCT (THE 1978 VERSION) WAS NOT FORESEEABLE BY ADMIRAL.

"UNDER NEGLIGENCE — THE FORESEEABILITY BY ADMIRAL OF THE USE/DESIGN OF THE PRODUCT (1972 OR 1978 VERSIONS) WAS SUCH THAT THE NEED FOR A CABLE OPERATED SWITCH WAS PRESENT. THEREFORE, NEGLIGENCE EXISTED ON THE PART OF THE DEFENDANT." [EOR, p. 5]

Following the reading of the foregoing note, Admiral unsuccessfully renewed its motion for judgment on the verdict. [Supp. EOR, pp. 17-19; R.T. (9/16) Vol. II, 5:10-22] The jury also found, in assessing comparative fault, that plaintiff was 10% at fault, his employer Allen was 60% at fault, and Admiral was 30% at fault.

Admiral moved for judgment notwithstanding the verdict or, alternatively, a new trial based on the jury finding that plaintiff's injury was *not* the result of a foreseeable use of Admiral's product. [(CR) 243] The trial court denied those motions and the appeal to the Ninth Circuit followed. [CR 253]

In this case, the jury's finding of no liability under plaintiff's products liability theory because the 1978 version of the conveyer line at issue was a "different product" and was an unforeseeable use of the Admiral line originally designed in 1972, while, on the other hand, finding Admiral liable for plaintiff's injuries due to the claimed negligent design of the 1972 line, is flatly inconsistent. The Constitutional question ripe for Supreme Court review is whether the lower court and Ninth Circuit's reconciling of the conflicts in the jury's verdicts "may fairly be said to represent a logical and probable decision on the relevant issues as submitted." *Griffin v. Matherne*, 471 F.2d 911 (5th Cir. 1973). Simple logic dictates that the jury verdict can *only be reconciled* by holding Admiral not liable under *either* strict liability *or* negligence theories.

D. Admiral's Argument On Appeal To The Ninth Circuit

On appeal to the Ninth Circuit, Admiral argued that the jury's finding that the 1978 conveyer line was a different product from that which Admiral installed, and that the use was unforeseeable to Admiral, was completely consistent with evidence which demonstrated that there was no causal link between the 1972 product and plaintiff's accident. There was no expert evidence supporting plaintiff's claim that the presence of a cable safety switch would have prevented the accident.

Additionally, the evidence indicated, and the jury's finding of the different product confirmed, that the 1972 alterations were such as to be an intervening cause precluding Admiral from being liable. Therefore, Admiral contended on appeal, and continues to contend, that the inconsistent verdicts must be reconciled in favor of Admiral.

ARGUMENT

THIS CASE PRESENTS A SUBSTANTIAL SEVENTH AMENDMENT ISSUE WHICH THE SUPREME COURT SHOULD RESOLVE

A. There Is A Seventh Amendment Mandate To Reasonably Resolve Conflicting Jury Verdicts

> "This Court is under a constitutional mandate to search for a view of the case that makes the jury's answers consistent. *Morrison v. Frito-Lay, Inc.*, 546 F.2d 154, 160 (5th Cir. 1977). 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved in that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.' *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 364, 82 S. Ct. 780, 786, 7 L.Ed.2d 798

> (1962). . . . Thus, the test to be applied in reconciling conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted. *Griffin v. Matherne*, 471 F.2d 911 (5th Cir. 1973)."

U.S. v. .78 Acres of Land, 81 F.R.D. 618, 621 (E.D. Pa. 1979). *See also Pyzynski v. Penn. Central Transportation Co.*, 438 F.Supp. 1044, 1046 (W.D.N.Y. 1977).

In this case, the District Court and Ninth Circuit have not reconciled the facially inconsistent jury verdicts to make for a "logical and probable" decision as required by the Seventh Amendment. Therefore, Admiral seeks review of this Constitutional question by the Supreme Court.

The constitutional dilemma raised by facially inconsistent jury verdicts is one that is becoming all too common across the country, especially in the products liability area, with the increasing popularity and use of special jury verdicts. There is thus a pressing need by litigants for guidance from the U.S. Supreme Court as to the Constitutional ramifications of irreconcilable or improperly reconciled special jury verdicts.

Admiral contends that if special jury verdicts have any validity, then the trial court must apply the specific factual findings of the jury on the special verdict form in accordance with the law. If the jury specifically finds an element of a cause of action not present, then the trial court should apply that factual finding in accordance with the law and rule for defendant. The trial court should not abrogate its role of ensuring the law is properly applied to the jury, which is limited to factual

determinations. Yet, if the trial court allows a jury determination of liability to stand which is contradicted by the express, specific factual findings of the jury, then the trial court has, in effect, abandoned its role of applying the law to the lay jury.

B. The Jury's Finding That The Processing Equipment Causing Injury Was Not Admiral's Warrants Reversal

The jury's finding that the polyurethane processing equipment in place at the time of plaintiff's injury was *not* Admiral's product precludes Admiral from being liable under either negligence or strict liability theories and requires reversal of the negligence verdict against Admiral. As described in the preceding factual summary, Admiral installed processing equipment at Allen in 1972. In 1978, plaintiff's employer substantially redesigned its processing line. The changes were so substantial that the jury concluded, in response to the Court's interrogatory, "We believe the 1972 and 1978 versions of the product are two different products." Given this specific factual finding that the product was not Admiral's, it is axiomatic that Admiral may not be liable based on negligent design for an accident involving this different product. It was therefore error not to grant Admiral's motion for judgment notwithstanding the verdict (stated more accurately the motion was for the entry of judgment *on* the verdict.) [Supp. EOR, pp. 5-19; CR 214; R.T. (9/16) Vol. I]

To recover under product liability (especially design liability) the plaintiff must, of course, prove that the instrumentality which injured him was the defendant's product. This rule is clear whether plaintiff's legal

theory is grounded on strict liability in tort *or negligence*. The California Second District Court of Appeal relied on the foregoing rule in affirming a non-suit against a plaintiff in a products liability action based on injuries incurred as a result of a defective fencing sabre:

> "Thus, appellant failed to clear the first hurdle in establishing respondent American's liability for any defect in the subject sabre. He did not sufficiently identify the sabre as being a product of American. . . . '*Regardless of the theory which liability is predicated upon, whether negligence*, breach of warranty, strict liability in tort, or other grounds, *it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product*. . . . Here, the sabre could have originated with either of two different sources of supply. This evidence is not sufficient to link American with Mr. Croddy's sabre by anything more than a chain of conjecture."
> *Garcia v. Joseph Vince Co.*, 84 Cal.App.3d 868, 874, 148 Cal.Rptr. 843, 846 (1978). (Emphasis added. Citations omitted.)

The record in this case, even more than in *Garcia*, precludes a negligence verdict against Admiral. Not only did the plaintiff fail to produce evidence that the

equipment in use by Allen at the time of plaintiff's accident was Admiral's product, *but, the jury expressly found that it was not.* Accordingly, Admiral was entitled to judgment on plaintiff's negligence claim as well as the strict liability claim.

C. Admiral Is Entitled To Judgment Based On The Jury's Finding Of Unforeseeable Use

Given the jury's finding that the conveyor had been changed to such an extent that it was no longer Admiral's product, it is not surprising the jury answered "no" to special verdict question No. 4, that the product was not being used in a manner foreseeable to Admiral, and also expressly found that the changed "use of the product (1978 version) was not foreseeable by Admiral." [EOR, pp. 2 and 5]

The District Court incorrectly embraced plaintiff's counsel's argument that foreseeable or intended use is not a necessary element of a claim based on negligent product design. Instead, the Court held that plaintiff need only generally establish "risk of foreseeable harm," regardless of whether the product was being used in a foreseeable or an intended manner. [R.T. (9/16), Vol. I, 8:21 - 12:17.] However, the authorities clearly demonstrate that under either negligence or strict liability theories, the product must be used in a foreseeable or intended manner.

In the landmark case, *Pike v. Frank G. Hough Company*, 2 Cal.3d 465, 85 Cal.Rptr. 629 (1970), the California Supreme Court held that a manufacturer may be held liable for negligent product design *only* where the product was used in an intended or reasonably foreseeable way:

> "The duty of a manufacturer with respect to the design of products placed on the market is defined in the Restatement Second of Torts, section 398: 'A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.' *Thus, the manufacturer must use reasonable care ' "to so design his product as to make it not accident-proof, but safe for the use for which it was intended." ' "*
> *Id.*, 2 Cal. 3d at 470, 85 Cal.Rptr. at 632 (emphasis added).

The correct standard is also set forth in *Preston v. Up-Right, Inc.*, 243 Cal.App.2d 636, 52 Cal.Rptr. 679, 684 (1966):

> " 'Unless he has a reason to expect otherwise, the seller is entitled to assume that the product will be put to a normal use, for the purpose of which it is intended . . . and he is not liable, either for negligence or for breach of warranty, when it would ordinarily be safe, but injury results because it . . . is used in some unusual and unforeseeable way. . . ."

(Quoting from Dean Prosser, 3d ed. 1964, §96, pp. 667-668).

See also Witkin, Summary of California Law, Vol. 4., Torts, Section 835, (8th Ed. 1979); and Restatement Second of Torts, Section 395, Comment J.

When applied to this case, the foregoing well-established principles of California law mandate that judgment be entered in favor of Admiral. The jury clearly found, as supported by the overwhelming and uncontradicted evidence, that the use of the product by plaintiff at the time of the accident was *not* foreseeable to Admiral. In light of this finding, and since foreseeable use is a necessary element of plaintiff's case for negligent product design, Admiral is entitled to judgment.

D. The Inconsistent Jury Verdicts On Negligence And Strict Liability May Be Reconciled In Admiral's Favor, Or Alternatively, This Case Must Be Retried

The jury's finding Admiral liable for negligence is flatly inconsistent with the jury's exoneration of Admiral for strict liability in tort. In this context, the elements of a strict liability claim must all be met before liability can attach for negligence. Given such an inconsistent jury verdict, the court is obligated to attempt to resolve the inconsistency to achieve a logical result. The jury's specific finding that the product was not Admiral's, and that the use of the product giving rise to the accident was not foreseeable by Admiral, demonstrate that it is the negligence verdict which must give way to make the

verdict rationally consistent and reflective of the jury's findings.

Upon receiving the special verdict of the jury, the District Court acknowledged the inconsistency between the jury's finding in favor of Admiral on the strict liability theory on the basis of unforeseeable use, while on the other hand, finding Admiral liable under plaintiff's negligence theory. The inconsistency arises because foreseeability is a necessary element of both strict liability in tort and negligent product design. However, the Court below reconciled the inconsistency based on an incorrect distinction urged by plaintiff. The Court opined that the foreseeability element necessary to establish strict liability was "foreseeable use" while in order to establish negligence the foreseeability must be "foreseeable risk of harm."[1] [R.T. (9/16) Vol. I 11:22 - 12:15.]

As shown by the jury's Special Verdict and explanatory note, the jury found that plaintiff was injured as the result of an unforeseeable use of a conveyor system which had been changed so dramatically that it could no longer be considered Admiral's product. However, the jury clearly was confused as to the foreseeability standard to be applied to plaintiff's negligence claim, and despite its finding the use of the product was not foreseeable, found negligence liability on the basis of foreseeable risk of harm generally without foreseeable or intended use. The jury's confusion is evident by its determination that there were "two foreseeabilities." It is also evident that in reconciling the verdict in plaintiff's favor, the District Court relied on the "two foreseeabilities" distinction urged by plaintiff.

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[1] Admiral's trial counsel objected to the court's distinction as being an erroneous statement of the law. *Id.* at pp. 13-14.

However, as discussed in Section C of this Brief, such a distinction finds no support in the law.

Assuming that the verdict contained an apparent inconsistency on its face, the proper course, we submit, would have been to reconcile the verdict in favor of Admiral, not against it. This result should have been accomplished by recognizing that the jury had been misled by plaintiff's argument that there were "two foreseeabilities" where as a matter of law in a product design case there is but one — foreseeable harm from a foreseeable or intended use — whether the theory is strict liability in tort or negligence. The jury's confusion was further compounded by the general, all-purpose jury instructions on negligence which were given to the jury and the fact that plaintiff's proposed special verdict form which the Court used allowed the jury to consider questions 5 and 6 relating to negligence even though they had answered in the negative question 4 concerning the foreseeability by Admiral of plaintiff's use of the product.

In the present case, the jury undoubtedly concluded that "foreseeability of risk of harm" as set forth in the general negligence instruction was wholly independent of whether the use was foreseeable or intended as contained in the strict liability in tort instruction. This erroneous dichotomy was exactly what plaintiff's counsel urged on the District Court and to the jury. Therefore, the finding of negligence most certainly resulted from a misunderstanding of the instructions. Furthermore, the jury's finding that the product was not Admiral's further requires that the jury verdict be reconciled in favor of Admiral, as that element is also required in negligence as well as strict product liability causes of action. (See Section B, *supra.*) Under the

circumstances, the verdict should have been reconciled *in favor of Admiral* not against it.

If this Court determines that the inconsistency between the jury's strict liability and product negligence findings cannot be reconciled, the case must be retried. *Guidry v. Kem Mfg. Co.*, 598 F.2d 402 (5th Cir. 1979). An illustrative case is *Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 860 (4th Cir. 1980), in which the appellate court held the jury's inconsistent strict liability and negligence verdicts required a new trial:

> "It is claimed that the verdict for Upjohn on the issue of strict liability is inconsistent with the verdict against Upjohn on the issues of negligence. We agree. The effect of the jury verdict on negligence was to find that Upjohn failed to use due care to give an adequate warning of the propensities of the drug marketed, and, in the same breath, the verdict on strict liability found that the drug marketed with such an inadequate warning was not unreasonably dangerous. The verdicts in the context of this failure to warn case involving prescription drugs are obviously inconsistent and cannot stand. The same may be said of the verdict against Upjohn so far as it may be upon an implied warranty, for the only evidence that the drug was not reasonably fit concerned the warning."

In this case, like *Werner*, the jury's answers to interrogatories indicate it found an essential element of both the strict liability and negligence claims lacking. We

contend that the jury's verdict, when read in light of its responses to the trial court's further interrogatories, should be reconciled in favor of Admiral as it is apparent that the jury concluded the product was not used as intended, and was not Admiral's product. However, at the very least, this Court should hold the verdicts inconsistent as in the *Werner* case, and remand the case for retrial.

For the foregoing reasons, Admiral requests the Court to grant its petition for certiorari to determine whether Admiral's Seventh Amendment rights have been violated by entry of a judgment which is cotnradicted by the specific factual findings of the jury.

Dated: April 2, 1990.

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
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U.S. Court of Appeals

CURLEY J. CHARLES,
Plaintiff-Appellee-Cross-Appellant,
v.
ADMIRAL EQUIPMENT CORPORATION,
Defendant-Appellant-Cross-Appellee.

C.A. Nos. 86-6757, 87-5536
D.C. No. CV-81-1412-RG

MEMORANDUM*

On Appeal From the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding
Argued and Submitted September 15, 1989
Pasadena, California

Before: SCHROEDER, BOOCHEVER and BEEZER,
Circuit Judges

Curley Joseph Charles appeals the district court's judgment reducing his recovery in accordance with a

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

retroactive application of California Civil Code § 1431 *et seq.* (Proposition 51). Admiral Equipment Company cross-appeals the district court's denial of its motion for judgment notwithstanding the verdict or, alternatively, a new trial based on the jury finding that Charles' injury was not the result of a foreseeable use of Admiral's product. We affirm the jury's finding of negligence but remand to the district court with instructions to reinstate the jury's original verdict in conformity with the California Supreme Court's decision in *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, P.2d 585, 246 Cal. Rptr. 629 (1988).

I

Charles was injured on July 9, 1980 while working as a "setup" man in the pour room of Allen Industries, Inc., a manufacturer of polyurethane seat cushions. His responsibilities included, among other duties, scraping hardened polyurethane foam which had dripped from a pour head onto the conveyor rollers below. He was to do this while the conveyor belt was in operation.

While Charles was scraping foam from the rollers he placed his right hand on a passing pallet and mold. The mold lid closed and locked on his hand. Unable to free himself, he was dragged along by the conveyor. While his arm was being pulled into another room, his body was squeezed against the wall and crushed by the impact of the next following pallet and mold. He suffered broken bones, a herniated disc, and nerve damage as well as flesh wounds.

Admiral had designed and installed a conveyor system for the Allen plant in 1972. However, in order to increase its production, Allen had converted its processing line from a hot process to a cold foam process. As part of the conversion, Allen replaced Admiral's original

pour heads with greater capacity equipment manufactured by an Admiral competitor. Allen also eliminated a series of three separate conveyors which Admiral had designed and installed to run through the pour room and rerouted the line's main conveyor through this area. This conveyor had also been designed by Admiral.

Charles filed this lawsuit in 1981 in the Superior Court for the County of Los Angeles. The case was timely removed to the Federal District Court for the Central District of California based on diversity jurisdiction under 28 U.S.C. § 1332.

Upon conclusion of the trial, the jury returned a special verdict, which consisted of its answers to nine "issues." Issues 1-4 primarily addressed strict liability, 5 and 6 addressed negligence, and 7-9 addressed comparative fault. The jury found that Admiral was not strictly liable. Although it found Admiral's design was defective and that that defect was the proximate cause of Charles' injury, it answered "no" to issue #4: "Did plaintiff's injury result from a use of the product that was reasonably foreseeable by the defendant, ADMIRAL EQUIPMENT COMPANY?" However, the jury found that Admiral was negligent and that its negligence was the proximate cause of Charles' injury.

Because of a possible inconsistency between these answers, the trial court explained to the jury that foreseeability was also a necessary element of a negligence claim. The court then directed the jury to review the instructions on negligence and to consider them in light of their thinking in answering issue #4. The court instructed the jury that if it meant to find Admiral negligent, it could simply return the form as originally signed. The court also instructed the jury that it could make any changes to the form or make an additional brief written statement. The jury returned the original verdict form with the following statement:

> We believe the 1972 and 1978 versions of the product are two different products. In answering question #4 our focus was on the 1978 version of the product. This use was not foreseeable to Admiral. In answering question #5 our focus was on the 1972 and 1978 versions of the product. Here there was foreseeable use in both the '72 and '78 versions. We have two "foreseeabilities."
>
> Under liability — the foreseeability of the use of the product (the 1978 version) was not foreseeable by Admiral. Under negligence — the foreseeability of the use/design of the product (1972 and 1978 versions) was such that the need was present. Therefore negligence existed on the part of the defendant.

The jury returned a verdict awarding $878,148.49 in total damages. With reductions for comparative negligence and credit for Workers' Compensation payments, the net award for Charles amounted to $721,821.05. However, the trial court granted Admiral's motion to apply California Civ. Code § 1431 *et seq.* (Proposition 51) retroactively and reduced Charles' judgment accordingly.

II

The jury found that Admiral was negligent in failing to provide for a safety switch along its conveyor. Admiral makes three arguments in regard to the jury's finding:

A) it is entitled to judgment based on the jury's finding that the equipment that injured Charles was not its product;

B) it is entitled to judgment based on the jury's finding that Charles' injury resulted from an unforeseeable use of the product;

C) the inconsistent verdicts on negligence and strict liability must be reconciled in its favor, or alternatively, the case must be retried.

A

Admiral's first argument is without merit. The jury did not state that the equipment causing Charles' injury was not Admiral's product. Instead, it merely stated that the 1972 and 1978 versions of the pour room were "two different products." Although the pour room had been modified, it maintained some elements of Admiral's original design, including one of Admiral's conveyors. Therefore, although the two versions were "different products" Admiral may still be liable for the negligent design and manufacture of its conveyor.

B

Foreseeability is a required element of a negligence claim. However, "the foreseeability required is of the risk of harm, not of the particular intervening act. In other words, the defendant may be liable if his conduct was a 'substantial factor' in bringing about the harm, though he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred."

5 Witkin, *Summary of California Law* § 976, at 376 (9th ed. 1988). Although Admiral may not have been able to foresee all of Allen's modifications to the pour room, it was foreseeable that some modifications would eventually occur. Further, it was foreseeable that the use of a conveyor belt without a safety switch could result in injuries.

C

Admiral's third argument is also without merit. As the Supreme Court has held, "it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' " *Gallick v. Baltimore and Ohio Railroad Co.*, 372 U.S. 108, 119 (1963) (quoting *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962)). The apparent inconsistencies in the jury's verdict may be reconciled by a reading which upholds the jury's finding of negligence.

The jury explained its answer to issue #4 in an additional statement.[1] The jury stated that it viewed the 1972 and 1978 versions as different products. In other words, the original 1972 design had been substantially changed. However, in regard to strict liability, California courts follow Restatement 2d of Torts § 402A, which

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[1] Fed. R. Evid. 606(b) does not bar consideration of the jury's statement as it was not merely "an attempt to explain the mental processes of the jury" but part of the verdict itself. Unlike the case in *Tanno v. S. S. President Madison Ves.*, 830 F.2d 991, 993 (9th Cir. 1987), where "[t]he matter in parentheses was not responsive to the questions asked," the jury in this case was invited to make changes in the form and to "make any additional brief written statements . . . ."

requires that the product reach the user or consumer without substantial change in the condition in which it is sold. *See Putensen v. Clay Adams, Inc.*, 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319, 325 (1970). The jury's statement indicates that in answering issue #4 the jury was actually saying that the 1972 design had been substantially changed because Allen had made alterations to the pour room which were not foreseeable by Admiral. Therefore, the jury found that Admiral was not strictly liable.

However, despite this finding, the jury nevertheless found that Admiral was negligent and that its negligence was the proximate cause of Charles' injuries. California courts have upheld findings of negligence where concurrent findings of substantial change have prevented the imposition of strict liability. *See Putensen*, 91 Cal. Rptr. at 329.

Further, issues 1-4 refer specifically to the "pour room," while issue #5 merely asks if Admiral was negligent. The jury's verdict may be reasonably construed as meaning that while not all of Admiral's changes to the pour room, *i.e.*, the change in the type of pour heads used, were foreseeable, nevertheless a foreseeable risk existed with respect to the use of the conveyor.

III

There is sufficient evidence to support the jury's finding that Admiral's negligence was a proximate cause of Charles' injuries. Charles' expert, Dr. Youngdahl, testified that the lack of a safety switch rendered the conveyor defective. He also testified that an emergency stop switch is a reasonable accident prevention system: "[i]f someone approaches the conveyor and for some reason makes inadvertent contact, gets inadvertently

trapped, they can pull the cord and stop the conveyor." Unlike the expert in *Rexall Drug Co. v. Nihill*, 276 F.2d 637, 643 (9th Cir. 1960), Dr. Youngdahl did not state that the defendant's negligence *may* have caused the plaintiff's injuries, *i.e.* that a person may have been able to stop the conveyor had there been a safety switch. Instead, he testified that with such a switch a person *can* stop a conveyor. Viewed in a light most favorable to the plaintiff, Charles, this testimony is sufficient to support an inference that had there been a safety switch, Charles would not have been injured. This inference is further supported by the fact that Admiral's original blue prints provided for such a switch.

IV

Admiral offered evidence that Charles' pain would have been reduced by his participation in a pain management program. Admiral argued that Charles' refusal to participate in such a program constituted a violation of his duty to mitigate damages. However, the trial court refused Admiral's request for a specific instruction regarding Charles' duty to mitigate his damages.

The failure to give instructions regarding Admiral's theory of the case is reversible error if the theory is legally sound and evidence in the case makes the theory applicable. *United States v. Escobar-de Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984).

The district court apparently based its decision on Charles' low mental capacity. Such a determination is not inconsistent with California law. California courts have looked to the condition of the particular plaintiff in determing what is "reasonable" in regard to his duty to mitigate. *See Berge v. Int'l Harvester Co.*, 142 Cal. App. 3d 152, 163, 190 Cal. Rptr. 815, 823 (1983) ("Mitigation is not required where the injured person is

financially unable to accomplish it."); *Stiner v. Travelers Indemnity Co.*, 226 Cal. App. 2d 128, 133, 37 Cal. Rptr. 813, 816 (1964) ("owner is under no duty to secure release of attachment if he is financially unable to do so, and the burden to prove duty to mitigate damages is on the party asserting that duty"). In fact, "what is reasonable in a given situation is determined by the facts, knowledge and problems then existent in relation to the person in trouble, the injured person, and his point of view at the time." *Basin Oil Co. of California v. Baash-Ross Tool Co.*, 125 Cal. App. 2d 578, 602, 271 P.2d 122, 136 (1954). Other jurisdictions have held in accord with this view. *See Wzorek v. City of Chicago*, 708 F. Supp. 954, 960 (N.D. Ill. 1989) ("Wzorek did not attempt to mitigate his damages, but this failure was understandable: he was and continues to be an emotional wreck").

V

Admiral argues that the district court erred in admitting evidence of the injury to Charles' hand and in excluding evidence regarding Charles' alleged drinking and use of marijuana as well as evidence regarding the custody proceedings between Charles and his former wife. We review a district court's decision regarding admission of evidence for an abuse of discretion. *United States v. Gwaltney*, 790 F.2d 1378, 1382 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987). Under this standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment. *See Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985).

With respect to the evidence of injury to Charles' hand, there was evidence that he would have been able to free his hand and that it would not have been pulled

along and stretched into the next room had there been a safety switch. Therefore, it was a question of fact for the jury whether Charles' hand injuries were also caused by Admiral's negligence.

Additionally, the court did not abuse its discretion in refusing to admit the testimony of Charles' ex-wife regarding his alleged drinking and use of marijuana. There was no direct evidence that Charles had been drinking or using marijuana on the date of the accident. The court properly held that the probative value of Cheryl Charles' testimony was outweighed by the risk of unfair prejudice.

Finally, the scope of redirect is a matter within the sound discretion of the trial court. *Murray v. Toyota Motor Distribs. Inc.*, 664 F.2d 1377, 1380 (9th Cir.), *cert. denied*, 457 U.S. 1106 (1982). The court did not abuse that discretion when it determined that additional questioning regarding the custody proceedings between Charles and his former wife would be merely cumulative evidence of the hostility between them and of insignificant value to the proceedings at hand.

VI

Subsequent to the district court's decision, the California Supreme Court held in *Evangelatos* that Proposition 51 should not be applied to actions pending prior to its effective date, June 4, 1986. Therefore, we remand to the district court with instructions to reinstate the original verdict.

VII

Charles is entitled to interest on the full amount of the reinstated verdict from the original date of entry of the judgment. He has been deprived of the use of that sum during the intervening period while Admiral has had the use of those funds. *See Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1299-1300 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).

VIII

The district court's retroactive application of Proposition 51 is reversed, and this case is remanded for reinstatement of the original verdict. The district court's verdict is affirmed on all other issues. Charles is awarded interest on the entire judgment from the original date of entry. Charles shall also recover his costs on appeal.

AFFIRMED in part, REVERSED and REMANDED in part.